MICHIGAN SUPREME COURT

Office of Public Information

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FOR IMMEDIATE RELEASE

SUPREME COURT TO HEAR FIRST ORAL ARGUMENTS OF 2004-2005 TERM

LANSING, MI, October 1, 2004 – Fifteen cases, including a lawsuit claiming that Midland-based Dow Chemical Company has contaminated the Tittabawassee River and nearby land with dioxin, will be heard by the Michigan Supreme Court next week in the first oral arguments of the Court's 2004-2005 term.

As in past years, the Court's seven Justices will hear the first case of the term in the Old Courtroom in the Capitol. The Court will then adjourn and resume hearing oral arguments in its courtroom on the sixth floor of the Michigan Hall of Justice.

Among the cases the Court will hear is *Henry v. Dow Chemical Company*, in which Dow Chemical has been sued by land owners and residents of the Tittabawassee River's flood plain. The Michigan Department of Environmental Quality has concluded that the river is contaminated with dioxin, a toxic chemical that has been linked to cancer, immune system damage and altered liver function. The plaintiffs in *Henry* claim that Dow is the source of the dioxin contamination, and they seek class action status for all affected property owners and residents. They also ask for Dow to pay the costs of medical monitoring for all members of the plaintiff class, although the plaintiffs do not claim that they currently suffer from physical injury or disease.

The Court will also hear *In re Noecker*, a complaint brought by the Michigan Judicial Tenure Commission (JTC) against Judge James P. Noecker of the St. Joseph County Circuit Court. The JTC has asked the Supreme Court to remove Noecker from office, arguing that the judge repeatedly failed to render timely decisions and fulfill other judicial duties because of his history of alcohol abuse. The JTC also contends that Noecker was drinking before he crashed his vehicle into a local party store, and that he falsely denied that he had been drinking before the collision.

Also before the Court are cases involving insurance, municipal, property, worker's compensation, medical malpractice, employment, and criminal law issues.

Court will be held on **October 5, 6 and 7.** Court will convene at **9:30 a.m.** each day.

(*Please note: The summaries that follow are brief accounts of complicated cases and may not reflect the way in which some or all of the Court's seven Justices view the cases. The attorneys may also disagree about the facts, the issues, the procedural history, or the significance of their cases. Briefs in the cases are available on the Supreme Court's website at* http://courts.michigan.gov/supremecourt/Clerk/msc_orals.htm/. *For further details about the cases, please contact the attorneys.*)

Tuesday, October 5
Morning Session (9: 30 a.m., Old Courtroom, Capitol Building)

GERLING KONZERN ALLGEMEINE VERSICHERUNGS AG v. LAWSON et al. (Resubmission) (case no. 122938)
Attorney for plaintiff Gerling Konzern Allgemeine Versicherungs Ag, Subrogee of the University of Michigan Regents: Michael T. Reinholm/(248) 433-1414
Attorney for defendants Cecil R. Lawson and American Beauty Turf Nurseries, Inc.: Gary W. Caravas/(586) 791-7046
Trial court: Washtenaw County Circuit Court
At issue: Historically, when the actions of two or more persons jointly caused an injury, each of them could be held liable for the full amount of damages. When one person paid the damages, that person could seek reimbursement, through an action for contribution, from the other person. In 1995, the Legislature enacted tort reform legislation that eliminated "joint and several liability" in many cases. Did the 1995 tort reform legislation also eliminate contribution among persons who cause injury (known as tortfeasors)?
Background: This case arises out of a three-way auto accident. One of the vehicles involved was owned by the University of Michigan Regents and driven by the University's employee. A second vehicle was driven by defendant Cecil R. Lawson and owned by defendant American Beauty Turf Nurseries, and a third vehicle contained Ricki Ash and James Nicastri, who were seriously injured in the accident. Ash and Nicastri sued the University, and their cases were settled. Gerling Konzern Allgemeine Versicherungs AG, the University's insurer, paid the settlements, and then sued Lawson and his employer, claiming that the University paid more than its share of their common liability. The Court of Appeals held that such claims for contribution are no longer available as a result of the 1995 tort reform legislation. Gerling Konzern appeals. This case is before the Court for the second time. The case was argued on April 21, 2004; in July, the Supreme Court directed the parties to appear for reargument.

Afternoon Session (1:00 p.m., Michigan Hall of Justice)

GRIFFITH v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY (case no. 122286)
Attorneys for plaintiff Phyllis L. Griffith, Legal Guardian for Douglas W. Griffith, a Legally Incapacitated Adult: George T. Sinas, Bryan J. Waldman, L. Page Graves/(517) 394-7500
Attorney for defendant State Farm Mutual Automobile Insurance Company: Daniel S. Sayor/(313) 446-5520
Attorney for amicus curiae Auto Club Insurance Association: Steven G. Silverman/(313) 963-8200

Attorneys for amicus curiae Coalition Protecting Auto No Fault: Terry L. Cochran, Mary K. Freedman/(734) 425-2400
Trial court: Ingham County Circuit Court
At issue: The plaintiff in this case is the wife of a catastrophically injured claimant who is cared for at home. Is her husband's no-fault insurance carrier obliged to pay for his food as an "allowable expense" under Michigan's no-fault insurance act?
Background: In August 1994, Douglas W. Griffith suffered catastrophic injuries in an automobile accident; his wife, Phyllis Griffith, was named his legal guardian. Douglas Griffith requires full-time care, which is provided by his wife and other caregivers in his home. In November 1997, Phyllis Griffith sued State Farm, her husband's no-fault insurance company. She claimed that State Farm failed to reimburse the Griffiths for various expenses. The only issue before the Supreme Court is whether State Farm should reimburse the Griffiths for the cost of Douglas Griffith's food. The trial court ruled in Phyllis Griffith's favor, finding that the cost of her husband's food is an "allowable expense" under the no-fault statute. The Court of Appeals affirmed. State Farm appeals, arguing that there must be a causal connection between the accident that caused the injury and his need for food. In this situation, State Farm argues, food is an ordinary life expense that would have been borne by the Griffiths before the accident. Phyllis Griffith responds that an "allowable expense" under the no-fault act includes "all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery or rehabilitation" – and this includes food.

NASTAL, et al. v. HENDERSON & ASSOCIATES INVESTIGATIONS, INC., et al. (case no. 125069)
Attorney for plaintiffs Ronald M. and Irene Nastal: Barbara H. Goldman/(248) 213-3800
Attorney for defendants Henderson & Associates Investigations, Inc., Nathaniel Stovall and Andrew Conley: Frank A. Misuraca/(248) 626-5000
Attorney for amicus curiae McMurray, Baio & Associates: Michelle L. Pinter/(810) 341-5501
Attorneys for amicus Michigan Council of Private Investigators, Michigan Professional Bail Agents Association, and Court Officers and Deputy Sheriffs, Process Servers of Michigan: Curtis R. Hadley, Matthew K. Payok/(517) 351-6200
Attorney for amicus curiae Michigan Self-Insurers Association: Martin L. Critchell/(313) 961-8690
Trial court: Wayne County Circuit Court
At issue: The lower courts acknowledged that a private investigator's surveillance for an insurance company that is investigating a possible insurance fraud is a "legitimate purpose" within the meaning of the stalking law. If the subject of the investigation becomes aware of the surveillance, can this type of activity become "harassment" under the terms of the statute so as to constitute stalking?
Background: Ronald Nastal sustained a minor concussion in a traffic accident. He sued the driver of the other vehicle, who was defended by his insurance company, State Farm. State Farm hired Henderson & Associates Investigations to conduct a surveillance of Nastal. During the first of four surveillances, Nastal suspected that someone was following him. He confronted one of the agency's investigators who denied that he was following Nastal. Nastal also apparently spotted the agency's investigators during the second and fourth surveillances. At this point, the surveillance was discontinued. Nastal sued Henderson & Associates and two of its investigators

under Michigan's stalking laws. The trial court held that Nastal stated a claim for stalking and concluded that the defendants' continuation of the surveillance after it had been compromised suggested that "the legitimate purpose [of the surveillance] had been abandoned in favor of an illegitimate purpose of harassment." The Court of Appeals affirmed. The Court of Appeals cited the investigators' deposition testimony that, once the target of a surveillance discovers that he is being followed, the surveillance activity serves no useful purpose and should be discontinued. Further surveillance creates a question of fact whether an otherwise legitimate activity becomes actionable harassment, the appellate court concluded. The defendants appeal.

MICHIGAN DEPARTMENT OF NATURAL RESOURCES v. CARMODY-LAHTI REAL ESTATE, INC. (case no. 124413)
Attorney for plaintiff Michigan Department of Natural Resources: Harold J. Martin/(906) 786-0169
Attorney for defendant Carmody-Lahti Real Estate, Inc.: Caroline Bridges/(906) 475-9971
Trial court: 12th Circuit Court (Houghton County)
At issue: The Michigan Department of Natural Resources (MDNR) purchased from the Soo Line Railroad a railroad right-of-way that crossed defendant's property. Was the initial grant of the easement to the Soo Line Railroad an unconditional right-of-way with no use restriction? Was the easement terminated by non-use?
Background: In 1873, the Quincy Mining Company conveyed a right-of-way to the corporate predecessor of the Soo Line Railroad. This right-of-way is adjacent to an apartment complex owned by Carmody-Lahti Real Estate, Inc. In the 1980s, the Soo Line Railroad pulled up the railroad track and sold its property interest to the MDNR. The MDNR operated a snowmobile trail on the right-of-way until Carmody-Lahti erected a fence across it. The MDNR sued Carmody-Lahti, seeking an order from the trial court that would prevent the defendant from maintaining the fence. The trial court ruled in the MDNR's favor. The court found that the Soo Line Railroad had not abandoned its property rights in the right-of-way, and that the MDNR had a valid property interest in the right-of-way. Accordingly, the MDNR could continue to operate its snowmobile trail on the right-of-way, the trial court said. The Court of Appeals agreed with the trial court and affirmed. Carmody-Lahti appeals.

Wednesday, October 6
Morning Session

HENRY, et al. v. DOW CHEMICAL COMPANY (case no. 125205)
Attorney for plaintiffs Gary and Kathy Henry, et al.: Bruce F. Trogan/(989) 781-2060
Attorney for defendant Dow Chemical Company: Barbara H. Erard/(313) 223-3500
Attorneys for amicus curiae Chamber of Commerce of the United States, American Tort Reform Association, National Association of Manufacturers, American Chemistry Council, Coalition for Litigation Justice, Inc., and Property Casualty Insurers Association of America: Frederick R. Damm, Paul C. Smith/(313) 965-8300, Victor E. Schwartz/(202) 783-8400
Attorney for amicus curiae Ecology Center, American Public Health Association, Endometriosis Association, American Lung Association of Michigan, Genesee County Medical Society, Physicians for Social Responsibility, Science and Environmental Health

Network, Lone Tree Council, Public Interest Research Group in Michigan, Sierra Club, and The Center for Civil Justice: Robert B. June/(734) 481-1000
Attorney for amicus curiae Defense Research Institute and Michigan Defense Trial Counsel: Mary Massaron Ross/(313) 965-4801
Attorneys for amicus curiae Product Liability Advisory Council, Inc.: William K. Holmes, Thomas J. Manganello, John J. Bursch/(616) 752-2000
Attorneys for amicus curiae Michigan Manufacturers Association: Frederick R. Damm, Paul C. Smith/(313) 965-8300
Trial court: Saginaw County Circuit Court
At issue: The plaintiffs in this case claim that their health may be at risk from exposure to the toxic chemical dioxin, but they do not claim that they currently suffer from injury or disease. Does Michigan recognize a pre-injury cause of action for medical monitoring? Can the defendant in this case, Dow Chemical Company, be ordered to pay the cost of the plaintiffs' medical monitoring?
Background: Dow Chemical has been sued by landowners and residents living on the flood plain of the Tittabawassee River, which the Michigan Department of Environmental Quality has found to be contaminated with dioxin. Dioxin is a toxic chemical that researchers have linked to various diseases, including cancer and immune system deficiencies. The plaintiffs claim that Dow Chemical is the source of the contamination. They seek class action status for all affected landowners and residents, and medical monitoring for all members of the class, even though they do not allege current physical injury or disease. Dow filed a motion for summary disposition, claiming that there is no cause of action in Michigan for such damages. The trial court denied the motion, interpreting the Supreme Court's decision in *Meyerhoff v. Turner Construction*, 456 Mich 933 (1998), as allowing the plaintiffs to develop a record for their claim. Dow asserts that *Meyerhoff* in fact bars the plaintiffs from maintaining their cause of action. The Court of Appeals denied Dow's application for leave to appeal. Dow appeals.

HALIW, et al. v. CITY OF STERLING HEIGHTS (case no. 125022)
Attorney for plaintiffs Valeria and Ilko Haliw: Raymond L. Feul/(248) 442-0510
Attorney for defendant City of Sterling Heights: Robert C. Davis/(586) 726-1000
Attorney for amicus curiae Michigan Defense Trial Counsel, Inc.: John P. Jacobs/(313) 965-1900
Trial court: Macomb County Circuit Court
At issue: Under Michigan Court Rule 2.403, which establishes a case evaluation procedure, a party must be awarded costs under certain circumstances. Does that include attorney fees incurred on appeal?
Background: Valeria Haliw slipped and fell on ice that had accumulated in a sidewalk depression. She and her husband Ilko Haliw sued the City of Sterling Heights. The city sought to have the case dismissed on the basis of governmental immunity. The trial court denied the city's motion to dismiss, and the Court of Appeals affirmed the trial court. The Supreme Court reversed and held that the claim must be dismissed on the basis of governmental immunity. On remand, the trial court entered judgment for the city, which then sought $31,618 in case evaluation sanctions under Michigan Court Rule 2.403(O). The trial court denied the city's request for an award of appellate attorney fees, but granted an award of $5,335 for the city's post-case evaluation trial costs and attorney fees. In a published opinion, the Court of Appeals held that appellate attorney fees could be awarded under the case evaluation rule. The court

reasoned that appellate attorney fees are not excluded from MCR 2.403(O), that a trial is not necessary to trigger sanctions, and that the applicable "verdict" for the purpose of determining sanctions is that rendered after appellate review. One judge dissented, noting that MCR 2.403(O) has consistently been interpreted as providing for attorney fees at the trial level only, and that the most recent amendments to that rule were not intended to address whether appellate fees or costs are assessable as sanctions. The plaintiffs appeal.

PEOPLE v. DAVIS (case no. 125436)
Prosecuting attorney: Donald A. Kuebler/(810) 257-3854
Attorney for defendant Gevon Ramon Davis: Neil C. Szabo/(810) 238-5800
Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: Timothy A. Baughman/(313) 224-5792
Trial court: Genesee County Circuit Court
At issue: Do successive prosecutions in different states violate Michigan's constitutional prohibition against double jeopardy?
Background: Gevon Davis either stole a car or received possession of it after the car was stolen by someone else. Davis then drove the vehicle to Kentucky where he was arrested and charged with a crime relating to the automobile theft. Davis eventually pled guilty to attempted theft by unlawful taking; the Kentucky court imposed a conditional jail sentence of one year. Davis was later charged in Michigan with unlawfully driving away a motor vehicle and with receiving and concealing stolen property over $1,000 and under $20,000, both charges stemming from the same criminal event. The trial court dismissed the Michigan charges, citing *People v Cooper*, 398 Mich 450 (1976), in which the Supreme Court held that successive prosecutions in different states violate Michigan's constitutional prohibition against double jeopardy. The Court of Appeals affirmed. The prosecutor now appeals, asking the Supreme Court to overrule *Cooper* in light of the United States Supreme Court decision in *Heath v Alabama*, which holds that successive prosecutions in different jurisdictions do not violate the constitutional prohibition against double jeopardy.

Afternoon Session

IN RE NOECKER (case no. 124477)
Attorneys for respondent Judge James P. Noecker: Peter D. Houk, Brian P. Morley/(517) 482-5800
Attorney for petitioner Judicial Tenure Commission: Paul J. Fischer, (313) 875-5110
At issue: Should Judge James P. Noecker of the 45th Circuit Court be removed from the bench for judicial misconduct as recommended by the Judicial Tenure Commission? Should he be required to pay costs?
Background: Judge James P. Noecker is a judge of the 45th Circuit Court in St. Joseph County. At approximately 5:20 p.m. on March 12, 2003, he drove into the parking lot of the Klinger Lake Party Store at the northwest corner of US-12 and Klinger Lake Road, and collided with the building, causing $15,000 to $20,000 in damages. Evidence suggested that alcohol might have been involved in the accident, and the Judicial Tenure Commission (JTC) opened an investigation. Several months later, the JTC filed a complaint against Noecker; a six-day public hearing was held in Kalamazoo in January 2004. A retired judge, appointed to serve as a master, reviewed the case, and filed a report with the JTC finding that Noecker had engaged in judicial

misconduct. Based on this report, the JTC asked the Supreme Court to grant an interim suspension of Judge Noecker; the Supreme Court granted the request and the judge has been suspended with pay since June 1, 2004. On August 4, 2004, the JTC issued its Decision and Recommendation, which asks the Supreme Court to remove Noecker from office. The JTC found that Noecker engaged in a persistent pattern of administrative failures, including the failure to render timely judicial decisions, due to a history of alcohol abuse. The JTC also found that Noecker had been drinking before the collision, and that he failed to credibly report the events of that day to the police and the JTC. Finally, the JTC recommends that the judge be ordered to reimburse the JTC in the amount of $22,572.76 for the expense of his prosecution. Noecker asks the Supreme Court to reject the JTC's findings. He argues that there was insufficient evidence to support the JTC's conclusion that 1) his abilities on the bench were affected by alcohol, 2) he consumed alcohol prior to the collision, and 3) the collision was the result of alcohol. The judge also argues that there is no statutory or constitutional basis to support the imposition of costs as the JTC has requested.

PEOPLE v. BARLOW (case no. 124965)
Prosecuting attorney: Jennifer Kay Clark/(269) 969-6976
Attorney for defendant Troy Anthony Barlow: Douglas W. Baker/(313) 256-9833
Trial court: Calhoun County Circuit Court
At issue: The defendant fondled the breasts and genital area of a 17-year-old woman who was visiting his apartment. Was there sufficient evidence to support defendant's conviction of fourth-degree criminal sexual conduct, where the complainant failed to testify to the use of any force or coercion to accomplish the sexual contact?
Background: A person is guilty of criminal sexual conduct in the fourth degree if he or she engaged in sexual contact with another person and "force or coercion" is used to accomplish the act. The defendant in this case, Troy Barlow, argues that the evidence at trial was insufficient to establish that he was guilty of fourth-degree criminal sexual conduct. The 17-year-old complainant testified that she accompanied a friend to Barlow's apartment where two other men were present in addition to Barlow. She claimed that Barlow fondled her breasts in the bathroom, and then told her to "get naked and come back out to the kitchen." The complainant testified that she complied with this request out of fear, and that Barlow then groped her. She also testified that she and Barlow later engaged in sexual intercourse, again against her will. Barlow testified that his request that the complainant "get naked" was a joke, that the complainant did not appear to be afraid, and that the two were mutually attracted and engaged in consensual behavior. The jury acquitted Barlow of third-degree criminal sexual conduct (relating to the intercourse), but convicted him of fourth-degree criminal sexual conduct (relating to the touching in the bathroom and kitchen). The trial court denied Barlow's motion for a directed verdict, and the Court of Appeals affirmed. Barlow appeals.

CITY OF MONROE v. JONES (case no. 125289)
Attorney for plaintiff City of Monroe: Robert D. Goldstein/(810) 695-3700
Attorney for defendant Helen Faith Jones: David F. Grenn/(734) 384-9700
Trial court: Monroe County Circuit Court
At issue: Under a provision of Michigan's motor vehicle code (MCL 257.675(6)), a disabled person is entitled to "courtesy [that] shall relieve the disabled person . . . from liability for a violation with respect to parking, other than in violation of this act [the Michigan vehicle code]."

Does this statute relieve a disabled person from liability for parking in a way that violates the Michigan vehicle code, if the ticket cites a local ordinance that is comparable to a provision of the Michigan vehicle code, instead of citing the code itself? Can the City of Monroe enforce its local ordinance against the plaintiff, a disabled driver?

Background: This case concerns interpretation of the Michigan vehicle code and raises an issue that has potential implications for the regulation of handicapped parking throughout the State. Over a one-year period beginning in September 2000, the City of Monroe issued more than 200 tickets that cited Helen Faith Jones, a disabled driver, for violating a local ordinance. The ordinance in question states that "[n]o person shall park a vehicle in the unmetered areas of the City continuously for a period of more than one hour where one-hour parking limits are posted." Jones argues that the tickets cannot be enforced against her. She points to a provision in the Michigan vehicle code, MCL 257.675(6), which states that a disabled person is entitled to "courtesy [that] shall relieve the disabled person . . . from liability for a violation with respect to parking, other than in violation of [the vehicle code]." Jones argues that the tickets issued by the City of Monroe cited the local ordinance, not the Michigan vehicle code, and she contends that § 675(6) prevents the city from enforcing its local ordinance. The district court and circuit court ruled that the city could enforce its local ordinance against Jones, despite § 675(6), but the Court of Appeals reversed in a published opinion. The city appeals. It argues that its local ordinance reflects the Michigan vehicle code parking restrictions, and that it does not matter whether the tickets issued to Jones cited the Michigan vehicle code or the local ordinance. The city further argues that the Court of Appeals decision misinterprets the scope of § 675(6) and has the effect of nullifying local parking ordinances as they apply to disabled persons.

GORDON v. HENRY FORD HEALTH SYSTEM (case no. 125335)

Attorneys for plaintiff Jeannette Gordon: Richard J. Ehrlich/(248) 557-1155, Daryl C. Royal/(313) 730-0055

Attorneys for defendant Henry Ford Health System: Barbara A. Rohrer/(313) 965-7610, Lincoln G. Herweyer/(313) 965-1900

Trial court: Worker's Compensation magistrate/Worker's Compensation Appellate Commission

At issue: The plaintiff receives weekly wage loss benefits from the defendant, her former employer. Should the plaintiff's profit from two adult foster care homes be set off against her benefits?

Background: Jeannette Gordon, a nurse, injured her back and stopped working in 1988. She filed a claim for worker's compensation benefits, and was granted an open award of weekly wage-loss benefits. In 1998, Henry Ford Health System (HFHS), Gordon's former employer, filed a petition to stop benefits and recoup benefits overpaid. The petition was based on the fact that Gordon and her daughter are shareholders in a corporation that, in turn, owns two adult foster care homes. HFHS argued that the income derived from the group homes should be set off against HFHS's obligation to pay benefits to Gordon. A worker's compensation magistrate found that the income from the group homes and from rental properties was investment income, not wages. In an *en banc* opinion and order, the Worker's Compensation Appellate Commission affirmed in part and reversed in part. The Commission agreed that the income was not wages, but concluded that income derived from other employment, including self-employment, should be deducted from Gordon's benefits. The Court of Appeals affirmed. Gordon appeals.

Thursday, October 7
Morning Session Only

CORNELIUS v. JOSEPH, et al. (case no. 123765)
Attorney for plaintiffs Barbara and Gerald Cornelius: Darlene B. Gricius/(248) 855-4882
Attorneys for defendants K. M. Joseph, M.D., Blue Water Vascular Clinic, and St. John Health System: Meria E. Larson, Francis J. LaGrou/(313) 961-7321
Trial court: St. Clair County Circuit Court
At issue: The defendant physician treated the plaintiff's varicose veins with a series of injections known as sclerotherapy. The plaintiff had an adverse reaction after the last injection, and alleges medical malpractice, claiming that the doctor did not obtain her informed consent to the procedure. Is the plaintiff's suit barred by the two-year statute of limitations for medical malpractice actions? Does plaintiff's informed-consent claim accrue from the date of the doctor's failure to obtain informed consent before the first injection, or does a separate claim accrue for the defendant's failure to obtain informed consent before each injection session?
Background: Barbara Cornelius, a licensed practical nurse, underwent sclerotherapy treatment for varicose veins and leg pain beginning on October 26, 1996. The treatments ended on March 31, 1997, when Cornelius had an adverse reaction to an injection. She sued the physician and others, alleging that the defendants failed to obtain her informed consent to the procedure. The suit was not filed within two years of the start of Cornelius' treatment, but Cornelius argues that it was filed within two years of the date of her last injection. The defendants moved for summary disposition arguing that Cornelius filed her case too late and that her case was therefore barred by the statute of limitations. The trial court agreed and granted the defendants' motion. The Court of Appeals reversed on this issue and held that Cornelius' claim was timely. The alleged failure to obtain consent before the initial treatment did not eliminate the need to obtain informed consent before subsequent treatments, the Court of Appeals said. The defendants appeal.

PEOPLE v. JACKSON (case no. 125250)
Prosecuting attorney: Danielle DeJong/(248) 858-0685
Attorney for defendant Nicholas James Jackson: Dennis M. Fuller/(586) 778-0900
Trial court: Oakland County Circuit Court
At issue: In this criminal sexual conduct case, the trial court admitted statements that the complainant's father – who died before the case went to trial – made regarding his observation of the sexual encounter between his son and the defendant. Did the trial court's decision violate the United States Supreme Court's decision in *Crawford v Washington*, which limits the admissibility of "testimonial" hearsay? Also, did the trial court err when it ruled that the defendant could not present testimony that his accuser had been coaxed into making a false accusation of sexual abuse in the past?
Background: Nicholas Jackson, then 19, and his 9-year-old stepbrother were discovered engaged in oral sex by the 9-year-old boy's father. The boy claimed that Jackson forced him to do it, and later said that Jackson had assaulted him once before. Jackson contended that the boy initiated the contact while Jackson was sleeping, and that the boy's father may have put him up to it. Because the boy's father died before trial, the trial court permitted testimony by the police officer who took the father's statements at the police station. The court also ruled that Jackson could not explore, at trial, allegations that the boy had been coaxed into making a prior false assertion of sexual abuse against his biological mother's boyfriend. The trial court concluded that

this evidence of a prior false accusation was not relevant and was prohibited by the rape shield law. At the end of the trial, Jackson was convicted by a jury of three counts of first-degree criminal sexual conduct. The Court of Appeals affirmed the convictions, concluding that the father's representations to the police were admissible under the "excited utterance" and "catch-all" hearsay exceptions. Although the allegations of a prior false accusation should have been admissible, Jackson had failed to make an offer of proof under the rape shield law, the appellate court said. Jackson appeals. He argues that the father's statements are inadmissible under *Crawford v Washington*, and that he should have been permitted to present evidence that the accusation was false.

REGAN/ZELANKO v. WASHTENAW COUNTY BOARD OF COUNTY ROAD COMMISSIONERS (case nos. 124163-4)
Attorney for plaintiffs Dona and Brian Regan: Thomas H. Blaske/(734) 747-7055
Attorney for plaintiff Leonard Zelanko: David F. Greco/(248) 355-0300
Attorney for defendant Washtenaw County Road Commission: Jon D. Vander Ploeg/(616) 774-8000
Trial court: Washtenaw County Circuit Court
At issue: The plaintiffs claim to have been injured as a result of an object or dust thrown up by equipment operated by county road commission tractors during highway maintenance operations. Are these tractors "motor vehicles" and did these injuries arise as a result of their "operation" as motor vehicles?
Background: These consolidated cases were brought by plaintiffs who claimed injuries from dust (Regan) or an object (Zelanko) thrown up by equipment attached to tractors being operated by Washtenaw County Road Commission employees. The Road Commission moved for summary disposition, arguing that governmental immunity barred the suits. The plaintiffs cited a provision of Michigan's governmental liability statute, MCL 691.1405, which states that governmental agencies are liable for bodily injury and property damage resulting from an employee's negligent operation of "a motor vehicle. . . ." The circuit court denied the Road Commission's motions for summary disposition, and the Court of Appeals issued a pair of published decisions affirming those rulings. The Road Commission appeals. It argues that the tractors were not "motor vehicles" and were not being operated as "motor vehicles" because they were being used for road maintenance and not transportation.

STANISZ v. FEDERAL EXPRESS CORPORATION, et al. (case no. 124377)
Attorney for plaintiff Barbara Stanisz: Richard B. Tomlinson/(248) 649-6000
Attorney for defendants Federal Express Corporation and Dennis Markey: Megan P. Norris/(313) 963-6420
Trial court: Saginaw County Circuit Court
At issue: The plaintiff was awarded $1,900,000 by a jury for claims relating to sexual harassment, sex discrimination, and retaliation. Later the Court of Appeals held that the sexual harassment claim must be dismissed. Is a new trial required?
Background: The plaintiff, Barbara Stanisz, sued her former employer Federal Express and her former co-worker and subordinate Dennis Markey for sexual harassment, sex discrimination, and retaliation. The trial court denied the defendants' motion for summary disposition and the matter proceeded to trial. All three theories were presented to the jury. The jury returned a general verdict awarding Stanisz a total of approximately $1,900,000. After considering the defendants'

argument that the jury's award was not supported by the evidence, the trial court reduced the award for past and future noneconomic damages by $900,000, and Stanisz accepted this reduced verdict. The defendants then appealed to the Court of Appeals. The Court of Appeals held that the sexual harassment claim should have been dismissed, but denied defendants' request to remand for a new trial on damages. The defendants appeal. They argue that when there is a general award of damages, and one of the theories of liability is found to have been improperly submitted to the jury, then a retrial is necessary. Stanisz responds that the three theories of liability overlapped. The fact that one theory was improperly submitted to the jury should not lead to a retrial because the same operative facts support the other two theories of liability, she contends.

--MSC--